

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JEFF LUBLIN, et al.,
Plaintiffs,

v.

YARTO INTERNATIONAL GROUP, L.P.,
et al.,
Defendants.

No. CV-07-3007-FVS

ORDER DENYING MOTION FOR
PARTIAL SUMMARY JUDGMENT

THIS MATTER came before the Court based upon the plaintiffs' motion for partial summary judgment. They were represented by Donald A. Boyd and James S. Berg. The defendants were represented by Dennis M. Holmgren and C. Gregory Shamoun.

BACKGROUND

Javier Munguia and Jeff Lublin formed Washington Export, LLC ("WashEx"), as a limited liability company under the law of the State of Washington law, presumably chapter 25.15 RCW. As of September of 2005, Messrs. Munguia and Lublin were WashEx's only "members." Cf. RCW 25.15.005(8) (the term "'[m]ember' means a person who has been admitted to a limited liability company as a member as provided in RCW 25.15.115 . . .").

1 WashEx was in the business of purchasing perishable agricultural
2 commodities from suppliers and selling them to buyers. One of the
3 companies with whom WashEx did business was Yarto International
4 Trading Company ("YITC"). It is not entirely clear what their
5 relationship was as of September of 2005. According to the
6 plaintiffs, WashEx obtained financing from YITC in order to expedite
7 payment to its suppliers. According to the defendants, YITC purchased
8 commodities from suppliers and sold them to WashEx.
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10 During September of 2005, Messrs. Munguia and Lublin sold their
11 membership interests in WashEx to Yarto International Group, L.P.
12 ("YIG"), a limited partnership organized and existing under the law of
13 the State of Texas. The terms of the sale were set forth in a
14 contract that is entitled "Membership Interest Purchase Agreement."
15 After selling their membership interests to YIG, they went to work for
16 YITC managing WashEx's day-to-day operations. The terms of their
17 employment with YITC were set forth in separate contracts, each of
18 which is entitled "Key Employment Agreement."
19

20 WashEx continued to negotiate sales of perishable agricultural
21 commodities. Typically, a supplier sold fruit to WashEx, who sold it
22 to YITC, who sold it to the ultimate purchaser. The supplier sent an
23 invoice to WashEx, who sent an invoice to YITC, who sent an invoice to
24 the ultimate purchaser. Each of WashEx's invoices to YITC documented
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1 the terms of the sale. YITC was obligated to pay WashEx for the fruit
2 within 30 days. WashEx printed this term on each invoice in order to
3 qualify for protection under the Perishable Agricultural Commodities
4 Act ("PACA"), 7 U.S.C. § 499a, et seq. Despite the deadline, YITC
5 rarely paid WashEx within 30 days. YITC asked WashEx to execute a
6 written waiver of its PACA rights. WashEx agreed. The waiver was
7 executed on or about December 12, 2005. Mr. Lublin signed on behalf
8 of WashEx. Steve Winkler signed on behalf of YITC.
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10 By the Summer of 2006, Messrs. Lublin and Munguia had become very
11 frustrated with YITC. In a letter dated July 31, 2006, they noted
12 that YITC was WashEx's only source of money. According to them, YITC
13 was not paying WashEx quickly enough to enable WashEx to pay its
14 suppliers prior to the 30-day deadline established by PACA. They
15 formally demanded that YITC "immediately pay all suppliers who are 30
16 days past due." In addition, they demanded that YITC pay "all other
17 suppliers" in a "timely" manner. *Id.*
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19 On August 11, 2006, Messrs. Munguia and Lublin formed U.S. Export
20 Company, LLC ("USEx"). Approximately two weeks later, Mr. Winkler
21 asked USEx to waive its PACA rights vis-a-vis YITC. On August 25th,
22 Mr. Lublin executed a written waiver of USEx's PACA rights.
23

24 During September of 2006, Steve Winkler and Robert Yarto traveled
25 to Yakima, Washington. They met with Mr. Munguia, Mr. Lublin, and
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1 representatives of Evans Fruit Company, 11 R Sales, Inc., and Borton &
2 Sons, Inc. They allege that they were threatened with a lawsuit
3 unless they acceded to a number of demands. Negotiations followed.
4 During October of 2006, three contracts were executed.
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6 One contract involved YIG, YITC, Mr. Munguia and Mr. Lublin. It
7 is entitled "Rescission of Membership Interest Purchase Agreement and
8 Termination of Key Employee Agreements" (hereinafter "Rescission
9 Agreement"). Its principal function was to return ownership of WashEx
10 to Messrs. Lublin and Munguia and to sever their relationship with
11 YITC. Mr. Yarto signed for YIG and YITC. He alleges that his
12 signature was procured through a combination of fraud and coercion;
13 the plaintiffs deny this allegation.
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15 Another contract involved the parties to the Rescission Agreement
16 plus Evans Fruit Company and Borton & Sons, Inc. This second contract
17 lacks a title, but the parties often refer to it as the "Settlement
18 Agreement." Its principal function was to determine the parties'
19 financial obligations. YITC allegedly accepted liability for some of
20 WashEx's debts to its suppliers. Some of the liability was certain;
21 some was contingent upon the actions of other parties.
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24 Between October 12, 2006, and December 31, 2006, both USEx and
25 WashEx supplied perishable agricultural commodities to
26 YITC. Since October 2nd, YITC allegedly has paid approximately

1 \$2,809,218.59 to WashEx and approximately \$388,507.50 to USEx.

2 According to YITC, these payments were more than enough to cover the
3 invoices that WashEx and USEx submitted to YITC after October 12th.
4 Instead of properly applying the payments toward the corresponding
5 invoices, says YITC, WashEx improperly applied the payments toward its
6 (YITC's) obligations under the Settlement Agreement. The plaintiffs
7 deny this allegation.
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9 On January 11, 2007, Mr. Lublin, Mr. Munguia, WashEx and USEx
10 filed an action in Yakima County Superior Court against YIG, YITC, Mr.
11 Yarto, and Mr. Winkler. The defendants removed the matter to federal
12 court. 28 U.S.C. § 1446(a). Removal was proper for either of two
13 reasons. To begin with, the plaintiffs seek relief under PACA. This
14 creates federal-question jurisdiction. 7 U.S.C. § 499e(c)(5)
15 ("district courts . . . are vested with jurisdiction specifically to
16 entertain . . . actions by trust beneficiaries to enforce payment from
17 the trust"); 28 U.S.C. § 1331. In addition, the parties are domiciled
18 in different states and the plaintiffs are seeking damages in excess
19 of \$75,000. This creates diversity jurisdiction. 28 U.S.C. §
20 1332(a).
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24 During February, the Court granted the parties' joint request for
25 the creation of a trust account in a bank. The defendants have been
26 depositing the proceeds of the disputed sales into the trust account.

1 According to the defendants, the trust account contains at least
2 \$869,042.78. The plaintiffs move for partial summary judgment. In
3 essence, they ask the Court to rule that ownership of the money in the
4 trust account referred to above is governed by PACA and that they are
5 entitled to the money in the account.
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7 **RULING**

8 PACA "requires licensed dealers to hold all perishable
9 commodities purchased on short-term credit, as well as sales proceeds,
10 in trust for the benefit of unpaid sellers[.]" *American Banana v.*
11 *Republic Nat'l Bank of N.Y., N.A.*, 362 F.3d 33, 37 (2d Cir.2004)
12 (citing 7 U.S.C. § 499e(c)(2)). However, a seller may waive PACA
13 protection. See, e.g., *id.* at 47 ("where, as here, a seller agrees --
14 orally or in writing -- to a payment period exceeding thirty days, it
15 forfeits trust protection"); *Hiller Cranberry Prods. v. Koplovsky*, 165
16 F.3d 1, 5 (1st Cir.1999) ("Any agreement extending the payment period
17 beyond thirty days generally constitutes a waiver of rights under the
18 PACA trust."). WashEx allegedly executed a PACA waiver during
19 December of 2005 and that USEx allegedly executed a PACA waiver during
20 August of 2006. Thus, in order to qualify for summary judgment, the
21 plaintiffs must demonstrate that the waivers ended, and PACA
22 protection resumed, before they made the sales that are the subject of
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1 this action.¹

2 Summary judgment is proper only if the plaintiffs can demonstrate
3 that "there is no genuine issue as to any material fact and . . .
4 [that they are] entitled to a judgment as a matter of law."

5 Fed.R.Civ.P. 56(c). Whether the plaintiffs are entitled to summary
6 judgment depends, in part, upon the meaning of the provisions of at
7 least two contracts. "[I]nterpretation of a contract provision is a
8 question of law only when (1) the interpretation does not depend on
9 the use of extrinsic evidence or (2) only one reasonable inference can
10 be drawn from the extrinsic evidence." *Scott Galvanizing, Inc. v.*
11 *Northwest EnviroServices, Inc.*, 120 Wn.2d 573, 582 (1993) (citing *Berg*
12 *v. Hudesman*, 115 Wash.2d 657, 668, 801 P.2d 222 (1990)). "[S]ummary
13 judgment is not proper if the parties' written contract, viewed in
14 light of the parties' other objective manifestations, has two or more
15 reasonable but competing meanings.'" *Go2Net, Inc. v. CI Host, Inc.*,
16 115 Wn. App. 73, 83, 60 P.3d 1245 (2003) (quoting *Hall v. Custom Craft*
17 *Fixtures, Inc.*, 87 Wn. App. 1, 10, 937 P.2d 1143 (1997)).
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23 In a diversity case, a federal court applies state rules of
24 contract interpretation because they are substantive rather than
25 procedural in nature. *Coplay Cement Co. v. Willis & Paul Group*,
26 983 F.2d 1435, 1438 (7th Cir.1993). This case is both a
diversity case and a federal question case. For now, the Court
assumes that state law governs the interpretation of the terms of
the alleged PACA waivers and the Rescission Agreement.

1 A. USEx Waiver

2 During August of 2006, YITC asked USEx to waive its PACA rights.
3 At Mr. Winkler's request, Mr. Lublin signed a letter containing a
4 single sentence. "Effective today, August 25, 2006 all future sales
5 made to Yarto International from US Export Company LLC. will be based
6 on 35 day sales terms." The plaintiffs concede that, by extending the
7 payment period beyond 30 days, Mr. Lublin waived USEx's PACA rights
8 vis-a-vis YITC. See, e.g., *American Banana*, 362 F.3d at 37.
9

10 Although the USEx waiver contains no limiting language, the
11 plaintiffs insist that Mr. Winkler understood it would expire 20 days
12 after its August 25th issuance. As support for this contention, the
13 plaintiffs cite numerous email messages between Messrs. Winkler,
14 Munguia and Lublin. For example, Mr. Winkler emailed Mr. Munguia on
15 August 24th:
16

17 To appease Wells for the next 20 days please print the
18 attached letter on US Export Letter head [sic], sign it and
19 email it back to me.

20 Presumably, the name "Wells" refers to Wells Fargo. The "attached
21 letter" is the USEx waiver. Since Mr. Winkler wanted the waiver in
22 order to "appease" Wells Fargo for 20 days, it follows, say the
23 plaintiffs, that he understood the waiver would expire 20 days after
24 its issuance. The twentieth day after August 25th was September 14th.
25 On September 20th, Mr. Lublin emailed a request for money to Mr.
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1 Winkler which states in part:

2 I need dough on the cash sales. I have shippers holding up
3 crossing documents.

4 Mr. Winkler responded less than one hour later. The first sentence of
5 his response states:

6 I'll get it today.

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8 Two days later (*i.e.*, September 22nd), Mr. Lublin emailed another
9 request for money to Mr. Winkler:

10 Stevie, don't kill me on us export. Get me money 20k a day
11 please

12 I will never be able to sell again or buy if I burn the
13 suppliers again, you committed to 30 days with me, don't
forget

14 The reference to "30 days" is potentially significant. As explained
15 above, a payment period of 30 days or less means that a sale may
16 qualify for PACA protection. To this message, Mr. Winkler emailed a
17 one-word reply:

18
19 ok

20 According to the plaintiffs, Mr. Winkler would not have responded as
21 he did if he thought the PACA waiver was still in effect.

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23 The messages quoted above are representative of the extrinsic
24 evidence that the plaintiffs have offered in support of their
25 interpretation of USEx's PACA waiver. The plaintiffs' reliance upon
26 extrinsic evidence raises three issues. One is whether the evidence

1 is admissible. See *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974
2 P.2d 836 (1999). A second issue is whether the defendants are
3 entitled to conduct additional discovery before the Court rules upon
4 the defendants' motion for partial summary judgment. Fed.R.Civ.P.
5 56(f). A third issue is whether only "one reasonable inference can be
6 drawn from the extrinsic evidence." *Go2Net, Inc.*, 115 Wn. App. at 85
7 (internal punctuation and citation omitted).
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9 Mr. Lublin wrote that effective August 25th, "all future sales"
10 would be based upon a payment period of 35 days. Extrinsic evidence
11 is admissible if it illuminates what the parties intended by the
12 phrase "all future sales," but not if it contradicts what Mr. Lublin
13 actually wrote. See, e.g., *Hollis*, 137 Wn.2d at 696-97 (trial court
14 properly refused to consider affidavits that contradicted the language
15 of a plat). To date, neither party has discussed whether the
16 plaintiffs' extrinsic evidence contradicts the terms of the WashEx
17 PACA waiver. Consequently, the Court will reserve ruling upon its
18 admissibility.
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21 Even if the plaintiffs' proposed extrinsic evidence is
22 admissible, summary judgment is premature. Mr. Winkler alleges that
23 he participated in a conference call with Messrs. Munguia and Lublin
24 on the 23rd or 24th of August of 2006. He says that, during the call,
25 they agreed to waive USEx's PACA rights. The defendants have not
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1 taken the deposition of either man. Their depositions could reveal
2 relevant evidence. As a result, the Court will give the defendants a
3 reasonable opportunity to conduct discovery before the Court addresses
4 the plaintiffs' contention that the USEx waiver was limited to 20
5 days. Fed.R.Civ.P. 56(f).²
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7 B. WashEx Waiver

8 On December 12, 2005, Mr. Lublin signed a PACA waiver on behalf
9 of WashEx.³ The waiver contains a cancellation clause:

10 [C]ancellation of this agreement shall be effective 30 days
11 after receipt by the non-cancelling party and Wells Fargo
12 Business Credit ("WFBC") of written notice of the other
party's cancellation[.]

13 (Letter of December 12, 2006, at 1.) The plaintiffs acknowledge that
14 they did not cancel the waiver in the manner provided by the letter.
15 Nevertheless, they argue that the waiver was terminated by either of
16 two writings.

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18 *1. Letter of July 31st*

19 One writing upon which the plaintiffs rely to prove termination
20 of the WashEx waiver is Mr. Lublin's and Mr. Munguia's letter of July
21 31, 2006. It is true, as the plaintiffs point out, that Messrs.
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24 Given the Court's resolution of the first two issues, the
Court reserves ruling with respect to the third.

25 The plaintiffs seem to concede that Mr. Lublin was
26 authorized to bind a limited liability company of which he was no
longer a member.

1 Lublin and Munguia referred to the WashEx waiver in that letter.
2 However, they did not cancel it. Instead, they demanded that YITC pay
3 WashEx's suppliers in a timely manner, particularly those who had
4 waited more than 30 days for payment.
5

6 2. Rescission Agreement

7 By the Fall of 2006, the relationship between YITC and Messrs.
8 Munguia and Lublin had become badly strained. During October, they
9 attempted to resolve a number of disputes by means of the Rescission
10 Agreement, the Settlement Agreement, and the Promissory Note. One of
11 the Rescission Agreement's purposes was to enable Messrs. Lublin and
12 Munguia to "resume sole ownership" of WashEx and to "completely
13 disassociate themselves" from YIG and YITC. (Rescission Agreement,
14 Recital "H," at 1.⁴) Another of its purposes was to enable the
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18 The defendants allege that the Rescission Agreement is void
19 or voidable because of fraud and coercion. It is unclear whether
20 they are correct. *Cf. Chadwick v. Northwest Airlines, Inc.*, 33
21 Wn. App. 297, 303, 654 P.2d 1215 (1982) (a release is deemed
22 voluntary if the releasing party signed of his own free will,
23 knowing that he was signing the agreement); *Pleuss v. City of*
24 *Seattle*, 8 Wn. App. 133, 137, 504 P.2d 1191 (1972) ("a mere
25 threat to exercise a legal right made in good faith is neither
26 duress nor coercion in law"). At this juncture, the Court
expresses no opinion with respect to whether the Rescission
Agreement is void or voidable. However, in an effort to provide
guidance to the parties, the Court will address the plaintiffs'
contention that the Rescission Agreement terminated the WashEx
PACA waiver. Obviously, this ruling is contingent upon the
validity of the Rescission Agreement.

1 parties to "determine, once and for all, how the obligations owed to
2 each other, third party suppliers and other shippers and vendors are
3 to be resolved[.]" *Id.* In partial fulfillment of these purposes, the
4 parties exchanged mutual releases. (Rescission Agreement, ¶4, at 3-
5 4.) Among other things, YIG and YITC relinquished any "rights" that
6 they may have had with respect to WashEx, whether based upon
7 "contract" or "statute," except "rights" created by the October 2006
8 agreement itself. *Id.* at 4 (second of two subparagraphs). The
9 defendants note that the Rescission Agreement says nothing about the
10 WashEx waiver. According to the defendants, the Rescission Agreement
11 "was meant to address the separation of WashEx from YIG and did not
12 address the ongoing business relationship between the parties." This
13 argument is unpersuasive. A release is a contract whose
14 interpretation is governed by traditional principles of contract
15 interpretation. See *Del Rosario v. Del Rosario*, 152 Wn.2d 375, 382,
16 97 P.3d 11 (2004) ("personal injury releases are contracts");
17 *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 187, 840 P.2d
18 851 (1992) (same); *Riley Pleas, Inc. v. State*, 88 Wn.2d 933, 937, 568
19 P.2d 780 (1977) ("compromise or settlement agreement is a contract").
20 The express purpose of the Rescission Agreement was to sever an
21 increasingly antagonistic relationship. The release contained in
22 paragraph 4 terminated any "rights" YITC had with respect to WashEx.
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1 Absent extrinsic evidence that the term "rights" did not include the
2 WashEx PACA waiver (and the defendants have presented no evidence to
3 that effect), a reasonable jury would have no choice but to conclude
4 that the Rescission Agreement terminated the WashEx PACA waiver
5 effective October of 2006.
6

7 **IT IS HEREBY ORDERED:**

8 The plaintiffs' motion for partial summary judgment (**Ct. Rec. 50**)
9 is denied as premature with leave to re-file after the parties have
10 had a reasonable opportunity to conduct discovery.
11

12 **IT IS SO ORDERED.** The District Court Executive is hereby
13 directed to enter this order and furnish copies to counsel.

14 **DATED** this 30th day of August, 2007.

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16 s/ Fred Van Sickle
Fred Van Sickle
17 United States District Judge
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